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CASE # 96-1856

In The Supreme Court Of The United States

October Term, 1996

ALBIN A. RHOMBERG, JOHN BURNS, MICHAEL BURNS, THERESA REALI, SCOTT KILEY, JACK COOKE, JOSEPH SCHEIDLER, AND ESTATE OF JOHN SZABO,*

PETITIONERS

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN MCGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY
And Appendix

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36 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Was recusal required where, prior to the filing of the lawsuit, the trial judge was an attorney for one Respondent for a significant portion of his legal career, and another Respondent, as U.S. Senator, played an essential and active role in the judge's nomination to the U.S. District Court?

2. Do Catholics, who believe in the sanctity of human life, have standing to assert the rights of the Unborn where, in their own Cathedral, they are arrested for praying for their faith, the Unborn, and the repentance of a pro-abortion governor-elect?

3. Are the Unborn "persons" in the Constitutional sense by virtue of the term "Posterity," as used in the Preamble of the Constitution of the United States, and therefore entitled to defend their lives, and to be defended by third persons, such as the Petitioners in this case?

4. Are Penal Code §§ 145 and 302 repugnant to the 1st Amendment when used to arrest and remove Catholics, who believe a pro-abortion governor-elect celebrating his inauguration in their Cathedral is a sacrilege, praying for their faith, and the repentance of the governor-elect, in the absence of violence or threats thereof?

5. Is there sufficient evidence raising genuine triable issues of fact that either Pete Wilson, Robert White, or both, deprived Petitioners, or caused Petitioners to be deprived of, federally protected rights in the arrest and removal of Petitioners from a Cathedral by virtue of their personal presence, right of control over other Respondents, and direct evidence they controlled the activities of other Respondents?

6. Does good faith depend on the facts observed in the arrest of Catholics in their Cathedral, rather than on the status of state law or the good faith of another person?

7. Did the trial court mislead the jury by following its decision on cross-motions for summary judgment, thus precluding the jury from considering the rights of the Petitioners to be present in the Cathedral to protect their religious beliefs, the rights of the Unborn, and their standing to protect the rights of the Unborn?

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REPLY

STATEMENT IN REPLY

A. STATE RESPONDENTS (PETE WILSON, DANIEL LUNGREN; STATE POLICE OFFICERS)

Respondents claim, in a letter, that petitioners "have failed to cite any conflict between the circuits, and therefore no reason exists for granting certiorari." One ground for review is a conflict between the decision reached and decisions of this court. Rule 10.1(c). The present case, of first impression, involves the arrest of people for praying in their church. Most people would understand the arrests are bad, but it requires this Court to settle that important First Amendment question. Moreover, this is the first case to bring to this Court's attention express words in the constitution which arguably apply to the unborn as person in the

constitutional sense.

B. CITY RESPONDENTS (CITY OF SACRAMENTO, DOWDEN, AND TWILLING)

City respondents have filed a notice of appearance and waiver of Opposition, unless this court requests one.

C. COMMITTEE RESPONDENTS (ALL OTHERS)

1. Introduction

The Committee has filed and served a Brief In Opposition (BO). Petitioner will address material points in the Opposition that mischaracterize the evidence, proceedings, and Petitioners' theory of the case.

Committee characterizes Petitioners as "anti-abortion protestors." (BO, p. 4, 6.) In fact, they are Catholics, who uphold the pro-life teaching of the Church.[1] (Pet., p. 5.)

Committee asserts, without citation to the record, that "The Governor-elect had no active role in the service; he was merely an attendee." (BO, p. 4.) Petitioners object to arguments in behalf of the Governor-elect by Committee because they do not represent him; the Attorney General of California represents him. Without waiving the objection, the claim is inconsistent with the views of the public (Pet., p. 3, fn. 3.), and his direct control over the persons who organized, planned, and implemented the program. (Pet. 27-28.) It is inconsistent with his own personal attempts to make everyone sit down. (AER, pp. 389, 684, 686, 687-88.) Finally, the most damming evidence comes from a member of his own staff, Respondent Pennell, that Wilson gave the order that started the arrests. (AER, pp. 462, 515.)

Respondents correctly note the attendance of persons at a meeting in which Colliau was instructed on his duties (BO, p. 5.), but omits that Msgr. Kidder indicated, at the meeting,

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[1] The fact that an issue may have a religious component does not preclude civil enforcement. (Pet., p. 3, fn. 4.) In fact, the Church's teaching is consistent with other religions. For instance, Premier Benazir Bhutto, a Muslim woman, urged delegates to the 1994 Cairo Coference on Population to abandon consideration of abortion. *Western delegates try to defuse abortion furor at population conference*, Knight-Ridder/Tribune News Service, 9/5/94 p0905K7263; see also, 2 Encyclopedia Judaica, Abortion, pp. 98-101 (1972)

he did not want any arrests. (AER, pp. 869, 1166.) Bishop Quinn personally asked local authorities to drop the charges and then apologized to the arrestees. (Reply Appendix (RA), p. A13; AER, p. 1022.)

Respondents claim that "Monsignor Kidder was present during the meeting. He testified at trial that he left security issues such as these to the discretion of the authorities. The Church would take no part, leaving the decision to arrest protestors in the discretion of the civil authorities. Bishop Quinn concurred that such decisions were up to the civil authorities." (BO, p. 5-6.) Monsignor's testimony is reconciled by the fact that civil authorities, in order to protect a governor-elect, must necessarily have discretion to deal with violence. However, whether a prayer in a church is disruptive is a decision the clergy, not peace officers, must make. (Pet., p. 26.) Indeed, Respondents concede that when they initially tried to move the petitioners, the Clergy moved the VIP section instead. (BO, pp. 9; AER, pp.868, 506, 508, 680.) Neither the Bishop nor Msgr. Kidder considered Petitioners' activities disruptive. (AER, pp. 485, 679; RA, pp. A10, A22.)

Respondents claim that Rhomberg and others "helped draft several **threatening** letters to the Governor-elect." (BO, p. 6.) Respondents then take four quotes from these letters (BO, pp. 6-8.), the worst of which says, "If you choose to ignore the moral issue we defend, *you can be assured of* continual, and relentless embarrassment and confrontation through the **lawful use of public protest**:...." (BO, p. 7.) Lawful public protest is permitted. E.g., 1st Amendment (Right to petition); *Magna Carta* (1215), Art. 61.[2] In all of the words quoted, **there is not one single word of violence**!

Respondents' claims that prayers disrupted the service

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[2] "And if we do not correct the transgression, ... within forty days, reckoning from the time it was brought to our notice ... the aforesaid four barons shall refer that case to the rest of the twenty-five barons and those twenty-five barons together with the community of the whole land shall distrain and distress us in every way they can, namely, by seizing castles, lands, possessions, and in such other ways as they can, saving our person and the persons of our queen and our children, until, in their opinion, amends have been made; ..."

are but a legal conclusion unsupported by any evidence. (BO, p. 9.) Respondents concede that Colliau acted on his own without indications from the Clergy the prayers were disruptive of the service. (BO, p. 9, middle paragraph.)

2. Tom Cooper

Respondents claim that Cooper was a volunteer and not directly responsible for Rhomberg's arrest. (BO, p. 10, 17.) Tom Cooper was responsible for the Event and reported directly to Clarey and M. Wilson. (AER, pp. (Cooper) 93-95, (McGagin) 100-01, 105-08, (M. Wilson) 79, 671, 1249-50.) As supervisor present at the event[3] (AER, p. (Clarey) 888; RA, A-22.), he had the ability to stop the arrests. By his acquiescence, he approved and ratified the arrests.

3. Martin Wilson

Respondents concede that M. Wilson was Director of the Inaugural Committee, and personally present, but claim he had no contact with Rhomberg.[4] (BO, p. 10, 17-18.) As a senior supervisor, personally present, he had the ability to stop the arrests, but did not. By his acquiescence, he approved and ratified the arrests.

4. The Campaign Committee

Respondents claim that the Campaign Committee was not the alter ego of the Inaugural Committee or vice versa. (BO, p. 11.) The heads of both the Campaign Committee and the Inaugural Committee were the same. Pet., pp. 8-9, 18-19.) It would be unfair to go to judgment against the Inaugural Committee only to find all the funds were with the

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[3] Respondents also claim that no evidence was produced. (BO, p. 17.) Clarey was asked to identify 4 people, on Videotape of the Event, and she unequivocally identified two, one of whom was Cooper. (RA, p. A23.) Plaintiffs mooted the conspiracy issue by dismissal. Plaintiffs submitted on Cooper's supervisory position, i.e. he did not personally arrest, but he had the authority to control and prevent the arrests.

[4] As with Cooper, the references to the Record for M. Wilson are not to evidence, but the separate statement of disputed facts which identifies each side's position on each fact, with citations to evidence. The defendants did deny participation in a conspiracy, a negative pregnant (*E.g., Mahanor v. United States*, 192 U.S. F.2d 873 (1st Cir., 1951).), but do not deny participation at the Event, in one role or another.

Campaign Committee and unreachable for lack of judgment against it. Stated otherwise, if they funded the event, they controlled it. To that extent, the participation of the policy makers would be sufficient to hold it liable.

5. Colliau and the Inaugural Committee

Respondents concede that the Event was a public one, and not strictly a Catholic one by virtue of the presence of other clergy, not necessarily even Christian. (BO, p. 4.) Petitioners concede there was a unanimous verdict. However, the judge did not allow plaintiffs' jury instructions regarding protected speech— prayer— at a quasi-political event in a public forum, thereby allowing the jury to consider the prayers a wrongful act. This misdirection of the jury is material requiring reversal. (Pet., pp. 22-30.)

In summary, what Respondents have tried to do is paint themselves as "straight arrows" and Rhomberg, and the other Petitioners, as "the bad guys." The court should ignore the character evidence. (F.R.E., R. 608.)

6. Summary of Uncontested Facts

The salient, material and uncontroverted facts are these: On, Sunday morning, January 6, 1991, there was a quasi-religious service in a Catholic Cathedral open to the public. There were clergy from many faiths, including non-Christian faiths,[5] to pray for Governor-Elect Wilson's new administration. There were security arrangements, but the church made known its intentions with respect to arrests. Activist Catholics did not want him honored there, and informed him that they would continue to pray until he changed his mind about abortion. He went there. They prayed for him. He had them arrested. No violence was threatened or done by petitioners at the event.

The arrests were repugnant to the First Amendment. The Court should overrule Roe v. Wade, the issue that led to the arrests because, based on a fresh approach to the is-

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[5] Petitioners hasten to add that non-Christian participation in Inter Faith services in the Cathedral is not bad. Their sole concern was a proponent of abortion in the Cathedral. The broad range of clergy is simply evidence that the Event transformed the Cathedral into a public forum.

sues, it appears that the unborn are a member of posterity.

ARGUMENT IN REPLY

I.

THE PETITION, LIBERALLY READ, STATES WHY RHOMBERG'S CLAIM OUGHT TO BE REVIEWED

A. INTRODUCTION.

Committee makes two fundamental claims. "[T]he petition ... contains no explanation whatever as to why Rhomberg believes the grant of summary judgment was improper. Nor does the Petition make any specific claim of error as to the jury verdicts." (BO, p. 12.)

The petition, on behalf of all petitioners, including Rhomberg, sets forth a number of reasons for error by the trial court, including: standing; whether the unborn are persons in the constitutional sense; the right to pray in the Cathedral during the event; and, the application of California Penal Code sections 145 and 302. (Pet., pp. 17-26.) The adverse ruling dismissed, Pete Wilson, Bob White, M. Wilson, and Tom Cooper, supervisors with power to stop or control the arrests and present at the Event thereby prejudicing Rhomberg. (Pet., pp. 27-28.) Jury instructions, consistent with the pretrial rulings, were given to the jury, thereby further infecting the process, especially leaving in the jury's mind that praying in one's own church was conduct justifying an arrest. (Pet., pp. 28-29.)

As Rhomberg has met his burden to show prejudice as to Committee, this Court should grant *certiorari*. As the only request for dismissal is that of Committee as to Rhomberg only, the Opposition is a negative pregnant justifying the grant of review as to all other issues and petitioners.

Petitioners will address each of the other issues seriatim.

B. RESPONDENTS MISCHARACTERIZE THE REASONS FOR RECUSAL, AND TIMELINESS

Respondents claim, "Prior government service precludes a District Judge from adjudicating cases only where he or

she has served in government service, and in that capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the controversy. 28 U.S.C., § 455(b)(3).[6]" (BO, p. 13.) That is an incorrect statement of the law, and does not reflect the position of Petitioners.

The basis for recusal was that of appearances of impropriety. (28 U.S.C., § 455(a).) Subdivision (b)(3), cited by Respondents, certainly sets out a per se rule of recusal where there is personal involvement. But even in the absence of personal involvement, recusal appears to be required in a case "... which his impartiality might reasonably be questioned" (28 U.S.C., § 455(a).) This is clearly such a case.

While it is true the trial judge had no personal involvement in the case, it is equally true the Event occurred within a year after he left City. His career was virtually all City service, with but a few years with the U.S. Attorney's Office and a year of private practice. Given about 12 years of service to the Defendant, in a fiduciary capacity, the appearances were such, in a First Amendment Case where other judges were available, that the case ought never to have gone to Judge Burrell. The second reason for recusal is his then recent involvement with Pete Wilson in the nomination process that put him on the Bench, with one of his first cases involving Pete Wilson. In essence, because of Defendants Wilson and City, there is an appearance of "a fox guarding the hen house," and it was, and is, not fair. (Pet., pp. 16-17.)

Respondents also claim the motion was untimely. (BO, p. 15.) The first suggestion of recusal was a document, marked urgent, filed February 24, 1994 that requested the judge consider his relationship with the defendants. The document noted the association of new counsel and explained plaintiffs became aware of the relationships with the Defendants only since new counsel came on the case. (AER, p. 59.) When no response was forthcoming, Plaintiffs made a formal motion. (Id, p. 54-59.) Between his assignment to the case and the suggestion he recuse himself, the judge

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[6] The section, with history, is set out in the Appendix to this Reply.

took no active part in the case in any material and meaningful way. Chief Magistrate-Judge Moulds handled all discovery, and discovery disputes. (Record below.)

First, there is no record the judge made a full disclosure of his relationship with the Respondents which precludes a waiver. (28 U.S.C., § 455(e).) Secondly, the motion was not made after "substantial **judicial** time has been devoted to the matter", such that the motion should be deemed timely. (Id, subd. (f).) Accordingly, the motion was timely.

C. RESPONDENTS ARGUE THE MERITS RATHER THAN WHETHER REVIEW IS REQUIRED ON THE APPROPRIATENESS OF GRANTING SUMMARY JUDGMENT

Respondents set forth the rules for granting summary judgment. Clearly, Petitioners were required to come forth with evidence to demonstrate there was a genuine triable issue of fact. However, Respondents concentrate on what their evidence proved, rather than demonstrating why Petitioners' evidence fails to raise a genuine triable issue of fact, as presented in the Petition. (BO, pp. 15ff; Pet., pp. 27-28.)

The judge did not simply reject relevant evidence, he rejected the direct testimony of Respondent Pennel on how the orders were passed from Wilson to the persons who made the arrests based on his own personal observations and participation. (AER, pp. 462, 515.) Similarly, the judge ignored direct evidence against Cooper in the form of deposition testimony by Clarey, Cooper's supervisor, clearly identifying him on video at the event. (RA, p. A22.)

The Judge should have denied motion. The order prejudiced Petitioners, including Rhomberg, by denying them an opportunity to vindicate their claims against the dismissed Respondents. It also prejudicially shaped the case to preclude Petitioners from arguing material facts and theory to the jury consistent with precedent from this court.

A review of this case is required because of the importance of the First Amendment values held sacred by this Nation, and because of the context in which it arises: Whether the Unborn have the right to be heard through those willing to vindicate the Constitutional rights of the

Unborn.

D. The Pretrial Rulings Prejudiced Petitioners at Jury Trial

Respondents claim that Rhomberg made no objections to the jury instructions or the special verdict. (BO, p. 20.) That is grossly misleading. The court already announced its intent with respect to religious beliefs and standing in the memorandum on motions for summary judgment. To emphasize the point, the judge combined the motion for reconsideration of these issues with the pre-trial conference. The court had made up its mind. (Pet., p. 29.) Indeed, both Attorney Carey (AER, p. 1503-04) and then Pro se plaintiff Rhomberg (AER, p. 1507-08.) tried to address these issues, but the court cut them off summarily with, "cite me a case." These objections, just before submission to the jury, appear sufficient to comply with Rule 51.

Based on the cases cited in the Petition at page 29, this court ought to grant the petition as to this issue.

CONCLUSION

WHEREFORE, for all, or any one, of the foregoing reasons, this court should grant the writ of *certiorari* to the Ninth Circuit, and summarily reverse and remand, or set the matter for briefing, argument, and such other and further relief as the court deems just under the circumstances.

Dated: September 18, 1997

Respectfully submitted,

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APPENDIX

EXCERPT FROM TITLE 28, U.S. CODES

SEC. 455. DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association,

or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, ch. 646, 62 Stat. 908; Dec. 5, 1974, Pub. L. 93-512, Sec. 1, 88 Stat. 1609; Nov. 6, 1978, Pub. L. 95-598, title II, Sec. 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub. L. 100-702, title X, Sec. 1007, 102 Stat. 4667.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., Sec. 24 (Mar. 3, 1911, ch. 231, Sec. 20, 36 Stat. 1090).

Section 24 of title 28, U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States.

The phrase "in which he has a substantial interest" was substituted for "concerned in interest in any suit."

The provision of section 24 of title 28, U.S.C., 1940 ed., as to giving notice of disqualification to the "senior circuit judge," and words "and thereupon such proceedings shall be had as are provided in sections 17 and 18 of this title," were omitted as unnecessary and covered by section 291 et seq. of this title relating to designation and assignment of judges. Such provision is not made by statute in case of disqualification or incapacity, for other cause. See sections 140, 143, and 144 of this title. If a judge or clerk of court is remiss in failing to notify the chief judge of the district or circuit, the judicial council of the circuit has ample power under section 332 of this title to apply a remedy.

Relationship to a party's attorney is included in the revised section as a basis of disqualification in conformity with the views of judges cognizant of the grave possibility of undesirable consequences resulting from a less inclusive rule.

Changes were made in phraseology.

AMENDMENTS

1988 - Subsec. (f). Pub. L. 100-702 added subsec. (f).

1978 - Pub. L. 95-598 struck out references to referees in bankruptcy in section catchline and in subsecs. (a) and (e).

1974 - Pub. L. 93-512 substituted "Disqualification of justice, judge, magistrate, or referee in bankruptcy" for "Interest of justice or judge" in section catchline, reorganized structure of provisions, and expanded applicability to include magistrates and referees in bankruptcy and grounds for which disqualification may be based, and inserted provisions relating to waiver of disqualification.

CHANGE OF NAME

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-598 effective Oct. 1, 1979, see section 402(c) of Pub. L. 95-598, set out as an Effective Date

note preceding section 101 of Title 11, Bankruptcy. For procedures relating to Bankruptcy matters during transition period see note preceding section 151 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Section 3 of Pub. L. 93-512 provided that: "This Act (amending this section) shall not apply to the trial of any proceeding commenced prior to the date of this Act (Dec. 5, 1974), nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act."

CROSS REFERENCES

Disqualification of trial judge to hear appeal, see section 47 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 460, 656 of this title; title 38 section 7264.

DEPOSITION REPORTERS' TRANSCRIPTS
MSGR. KIDDER

Volume I

*****

Q Do you recall the person saying these words, "And may Governor-elect Wilson denounce his pro-abortion position which has made this ceremony a sacrilege"?
A That may very well have been what it was. I don't recall.
Q If the person had said that, would you consider that a prayer?
A Not by its nature. It could be a wish or a prayer, I guess. I don't know to whom he was directing it.

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[105]

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Q Right. In earlier discussions you indicated that there were certain policies within the church for disruptions. First you ask the person to stop. Then, if he doesn't stop, you ask him to leave or you -- you

ask him to leave. And then, if he doesn't leave, you then -- there may be a time that you ask to have the police called and have him arrested.
MS. McEVOY: Removed.
THE WITNESS: **If the disruption continues. Not arrested, removed, and I've insisted on that all day.**

[114]

Volume II

Q You've testified about what Mr. Laubacher said during your discussion with him. What, if anything, did Mr. Rhomberg say during that discussion?
A Mr. Rhomberg did most of the talking. I

[138]

remember a large portion of it being the evil of abortion, which both Father McFarland and I both readily agreed with. He also presented materials to us about the evil of abortion with which I was already pretty familiar and so was Father McFarland.
I think the discussion centered very much on whether we were honoring Mr. Wilson or not as a person. I believe I indicated earlier we were acceding to his wishes as Governor-elect of California, not taking any kind of agreement on any political stance of his any more than we did with any other governor.

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TRIAL REPORTERS' TRANSCRIPTS
MSGR. KIDDER

Q And did you participate in those discussions?
A Yes. I explained --
Q Go ahead.
A I explained what the policy had been from my experience as pastor of the cathedral and how to handle situations where people would be disruptive.
Q One of the subjects of that meeting, I take it, was the question of possible disruption or

interference somehow with the event on the 6th?
A That's correct.
Q And at that meeting did you indicate what the cathedral's policy was in terms of how to deal with those issues?
A I gave them our experience which was -- pardon me -- our policy which was that if someone does something that's disruptive, that someone approach that person and ask them to stop. If the person stopped, that would be the end of it. If the person didn't stop, that the police could be called to intervene.
Q And did you discuss policy in terms of

[885]

removal of people from the cathedral?
A Yes. In the sense it would be up to the police to make a removal. We would ask people to leave. If they didn't, the person -- ask the person to stop, but ask the person to leave if the person did not stop the disruption.
Q Was the policy of the cathedral that you discussed at the meeting in favor or against arrest of persons who might cause a disruption?
A I would say that was left in the hands of the police. **We would call for intervention. We would not be making an arrest -- party to an arrest ourselves in those kinds of situations.**
Q Let me diverge just a moment to another issue.
At that time did the cathedral have what would be called an open-door policy with respect to the right of people of the Catholic faith to enter the cathedral and pray?
A That's correct. Open-door policy? Is that what you asked?
Q Yes.
A Yes.

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[886]

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Q What did they -- well, could you just simply summarize as best you can what they said and what you said and what Father McDermott said at the meeting?

A Their request, as I understood it, was that the event should be canceled because in their mind Bishop -- pardon me -- Governor Elect Wilson had a prochoice stance. And that in our having the service there, we are honoring him. And we disagreed with that.

We tried to emphasize that he was the elected governor-to-be of California and that as an elected official and in his capacity as Governor Elect, that **we were doing a good civic thing** by allowing a prayer service to take place as part of his inaugural event.

Q Did they say to you that they felt that having the service in the cathedral would be a sacrilege or a scandal?

A I don't recall that. If they did, I guess I wouldn't have entertained it for too long. However, to summarize, we did try to listen to what their concerns were and emphasize that they did have a hearing from us and that I would do what I would consider the prudent amount of

[907]

consultation.

Q Now, did you do that consultation?

A Yes.

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Q Did there come a point in time when you received a telephone call from a woman by the name of Laurette Elsberry concerning the service?

A Yes, there came a time. When that time was, I don't remember exactly. It was late at night around 11:30 or so, but I don't remember what day.

Q Did you know her to be affiliated with Mr.

25 Rhomberg and Mr. Laubacher?

[908]

1 A With the former, but not with the latter.
2 Q With Mr. Rhomberg?
3 A Yes.
4 Q And did you discuss with her what word you
5 had gotten back from the bishops?
6 A Yes, I did.
7 Q What did you tell her in that regard?
8 A **I told her that we were not honoring the**
9 **Governor Elect as a person**; that this was not in
10 any way condoning a prochoice stance, but that it
11 **was a response as citizens to our Governor Elect.**

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[909]

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15 Q Did there come a time that morning prior to
16 the ecumenical service when you personally
17 approached that group?
18 A Yes. When it was pointed out to me that
19 they were there, I went down and let them know
20 that those pews were reserved and asked them to
21 move back.
22 Q Did they move back?
23 A No.
24 Q Did you tell them who the pews were reserved
25 for?

[915]

1 A I certainly did not in the beginning.
2 Whether I did later, I don't remember.
3 Q Was Mr. Rhomberg among the group that you
4 spoke with?
5 A Yes.
6 Q And you know Mr. Rhomberg?
7 A I do.
8 Q You knew him before the ecumenical service?
9 A Yes.

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[916]

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Q BY MR. PARRINELLO: Did they move --
A No.
Q -- in response to your request?
A No.

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[917]

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Q BY MR. PARRINELLO: **Did you confer with Bishop Quinn after you saw these people in the front who refused to move?**
A **Yes, I did.**
Q **And did Bishop Quinn give you any instructions** as to how to deal with the situation?
A Not instructions as such. In discussing it, he stated his preference that the -- pardon me. Let me put it this way: I told him that they were in that location that was intended both for the Governor and the newly appointed senator, and that I would see as a possibility having the Governor sit elsewhere.
And **he stated his preference that rather than to force these people to move, that he would have preferred to have the Governor sit in another location.** I went out and expressed that to the proper authorities because I believe that to remove somebody from that location when they hadn't done anything particularly wrong from a standpoint of disrupting anything at that time

[919]

would not have been wise.
Q At that time did you have any information that those people might attempt later to disrupt the service, the ecumenical service?
A I would say all we had was any kind of speculation. **Nobody told me or threatened me** in any way that I can recall that they were going to do anything.

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[920]

DEPOSITION REPORTERS TRANSCRIPT
BISHOP QUINN

Q. Okay. Do you recall what the substance of Mr. Laubacher's objection was?
A. The objection was that the governor had taken a pro-choice position on abortion and that, therefore, we shouldn't have a prayer service.
Q. Okay. At the time were you aware of Governor Wilson's position on that?2
A. On abortion?
Q. Yes.
A. Yes.
Q. Did you have a disagreement with the objection that in fact Governor Wilson had that position?

[51]

A. I – did I disagree with the objection?
Q. No. Did you voice agreement or disagreement with the fact when presented to you that in fact Governor Wilson was pro-choice?
A. I – when the whole thing was introduced, the idea of a prayer service, it didn't enter into my mind a particular position that a candidate would take. It was just that every administration needs all the help it can get in the way of prayer, and so that didn't enter my mind. When the specific objection was brought up, I thought that to have a prayer service for a political office holder was a good thing, that it wasn't endorsing his position, because every government official that we elect has some positions that we're opposed to. But the church prays for them, and so I didn't think that it was inappropriate to have the prayer service.

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What was the substance of the objection why they did not want the cathedral used?

A. Well, because I guess someone who took a position that was against what the church's position was should not have a prayer service in the cathedral.

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Q. BY MR. CAREY: Were you ever aware that one of the individuals arrested on January 6, 1991 -- or were you aware that there was an individual that was arrested at the cathedral who was not part of this lawsuit?

A. Yes. Subsequent to the case, I heard that, yes.

Q. Okay.

A. I don't know about whether he is part of this lawsuit, but I don't think he was part of the group that was there for this -- these -- this purpose.

Q. Okay. We'll get to what that purpose was. But did you talk to this individual?

A. I did subsequently, yeah.

Q. Do you know him to be Patrick McKay?

A. Yes.

Q. Was he a regular parishioner at the time?

[60]

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A. I didn't know prior to that.

Q. Did he indicate to you what his purpose was for being at the cathedral on that day?

A. He said he was just going to mass.

Q. And did he describe to you the circumstances under which he was arrested?

A. If he did, I don't recall. I think he just said he was arrested and put into the police van. That's about all I remember him telling me.

Q. Did you take any steps after hearing that he was arrested to contact the people who organized the event?

A. No, not the people. That would have been the interfaith clergy and whoever worked with them. I

didn't contact them.
Q. Okay. Did you contact -- did he indicate who arrested them?
A. If he did, he said the police. That's all.
Q. Okay. Did you contact -- other than -- well, did you contact the police regarding his arrest?
A. I contacted -- I tried to contact the District Attorney's office or the sheriff. I remember going to the jail, asking whom would I contact, that we had not pressed charges, and did not know of the arrest until after the event.

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Q. Okay. Do you recall in particular what the concern was regarding the scandal that was expressed?
A. I guess the concern would have been namely that we were having a prayer service for a government official who took a position that was opposed to an important position of the church.
Q. Do you think Father McDermott indicated to you at that meeting that he had consulted any church authorities?
A. Not that I recall.
Q. Okay. Did he indicate he had consulted canon law on the matter?
A. He may have, but I don't remember.
Q. That was Father McDermott did you ask?
A. Correct.
Q. Okay. Other than Father McDermott, Monsignor Kidder and Father Steinauer, did you have any other discussions regarding this event with other church officials?
A. The only one I remember was Cardinal O'Connor called me because he was chair of the pro-life activities for the bishops' conference, the United States Bishops' Conference, to just say that he had had someone submitting a complaint to him, and he wanted to get my position on it. And I told him on

that occasion just exactly what I've said here today.
Q. Did he -- did he identify who the complaint was

[68]

from?
A. No, I do not think he did.
Q. Okay. Do you recall how soon before the event this occurred?
A. That was just within -- within a week or ten days.
Q. You indicated he had an official capacity. What was that?
A. He was chair or the episcopal moderator of the pro-life committee of the National Conference of Catholic Bishops.
Q. Now, in that position does he have any authority over what takes place in any other diocese?
A. No.
Q. Okay. What is -- do you know what his authority is as chair episcopal moderator of pro-life?
A. It's to help the bishops address this whole question. That's what the committee does. The NCCB conference doesn't really have jurisdictional authority over what individual dioceses do. They're all independent.
Q. In the conversation with him, did he indicate what his policies are in his diocese?
A. He didn't speak to me in terms that he was objecting to it at all. He was actually asking for my mind on the matter because a complaint had been brought to him. And if I remember correctly, to

[69]

answer your question, as close as he got to what he does in his own diocese, "I know that I give invocations for mayors when they are elected, and they don't always hold the positions that I hold." I recall him saying that. So he was understanding what we were trying to do there.

Q. When he was indicating invocations, was he indicating at the -- the actual swearing in?
A. I think at the swearing in, yeah.
Q. But at that time he didn't indicate to you anything regarding having any ecumenical event for these public figures?
A. No, I don't think so.
Q. And what was the -- did he indicate what the substance of the complaint was that he had received?
A. I think the way he put it to me was that he had a complaint that they were having a prayer service for the governor who had a pro-choice position with -- that was the complaint brought to him. I told him my mind on it was what I have explained to you today, and he took that as a position and says that's fine.
Q. Okay.
A. He didn't make a judgment on it.
Q. Was there any discussion between the two of you regarding what would be the proper use of the cathedral?
A. No.

[70]

Q. So it would be fair to say he simply addressed the specific complaint?
A. Yeah.
Q. Okay.
A. He asked about the complaint, what my mind on the thing was.
Q. Okay. Did he indicate that part of the complaint was that the -- a mass would be changed?
A. No. I don't think he brought that up. I may be mistaken, but I don't remember that. I think it had to do with the abortion issue.
Q. Did he indicate to you that the complaint was from somebody in the Sacramento diocese, or elsewhere?
A. I think he indicated it was from Sacramento.
Q. Okay.

A. Don't know that it -- I can't recall that it was outside of Sacramento.
Q. Okay. And did he indicate the purpose of his call besides that he had received a complaint?
A. That was the only purpose.
Q. Okay. You indicated that he took the information. Was it your understanding that he just wanted the information regarding the event?
A. Yeah. I think most bishops who are in a position like he is, or in any position, want to follow through with complaints. They just don't disregard them. He wanted to know my side of the

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problems, so I gave it, and that was sufficient for him.
Q. Okay. And did he indicate that he would be doing a further examination of the complaint?
A. No.
Q. Okay. Did you receive any correspondence from any other church official other than Cardinal O'Connor?
A. Not that I recall.
Q. Okay. Prior to the event, did you speak with the Papal Nuncio for the United States?
A. I don't remember talking to him on this subject. As you know, we're talking about three years ago, so I could have forgotten, but usually I remember something like that. He's talked to me on other subjects, but I don't recall it on this instance.
Q. Were you ever contacted by any other official in Rome?
A. No.

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[72]

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Q. Now, I'd like to address as bishop in the diocese of Sacramento, are you aware of the frequency of disturbances in the cathedral, what that frequency

is?
A. Well, sort of organized disturbances are very rare where it involves more than one person, but you do have disturbances. Sometimes people come in that are mentally unbalanced, unfortunately, and they may shout out. That may happen.
In any given church you may have parishioners having difficulties. That might happen in the cathedral. We have a gentleman that does that once a week, but we all understand him. He is a good person.

[80]

Q. What steps are normally taken by the church officials in the cathedral, if you know, when such a disturbance occurs?
A. Well, in the case I've given, no steps are taken. If you just let him say a few words out loud, then he quiets down, and that's the end of it.
Q. Okay. Other than this individual you're remembering, are there any policies that the -- that you're aware of that the cathedral has for quelling any disturbance?
A. I don't know of any written policies. I think in the cathedral, as in all churches, the idea would be to see if the person is going to quiet down, and then nothing more is done of it. The person persists, perhaps someone would. Oftentimes parishioners around that person will try to shush the person. And if they continue to go, I would say the practice would be to -- an usher would probably come up and ask the person to be quiet.
Q. Were you ever aware of any circumstances where the police have had to come in and remove people during a service?
A. No, not when I have been present. And have I heard of any? I think there have been occasions when the police have been called, but I haven't noticed it -- I didn't understand it -- that it was happening in the church proper. Maybe in the

vestibule. I don't know -- recall cases where police

[81]

have actually ejected people, but police have been called when someone just absolutely refuses to behave. And on rare occurrences it's happened.

Q. Okay. Now, for the event of January 6, 1991, prior to the event, were you made aware of any discussions regarding the possibility of disruption?

A. Yes.

Q. And when was that?

A. I would say within about two weeks before the event.

Q. Okay.

A. Not so much that we had an idea disruptions would take place, but that we could anticipate them from having known that things like this had happened elsewhere and in the cathedral, but not so much in the church but in front of the church.

So it was anticipating that these might happen. I don't remember any overt threats that have happened, although they could have been, because I was away in that week before.

Q. Okay. Were you made aware in that two-week period that individuals might be in the cathedral, not that there was a threat, but that it was a possibility?

A. I think I was.

Q. Okay. And what was discussed regarding that possibility?

A. Not much was discussed as to, you know, what

[82]

would our response be, until probably the morning of the event itself. And we knew that with the high government officials present, that there would be security there, and I guess we just counted on them to do what they had to do in their jobs. And the provision we made -- as I remember it, I was just getting this on the morning of the event, was that ushers would be asked to handle anything that did

happen.
Q. Did anybody -- who indicated that to you?
A. Monsignor Kidder.
Q. And did he indicate what ushers these were?
A. I don't think he did by name.
Q. Can you -- well, what did you understand him to mean by "ushers"?
A. I would think the church ushers. I'm not sure. He may have told me there was some special ushers brought in. I just don't recall that.
Q. Okay. Did you -- in your discussion with Monsignor Kidder, was there any discussion regarding arrests?
A. Not that I remember a discussion about arrests. About removal, I think that possibly came up, but not arrest.
Q. Did you express any opinion at that time as to whether arrests should take place?
A. No. I don't -- I did not.
Q. Did Monsignor Kidder?

[83]

A. Not that I remember. I really don't remember us getting into arrests themselves. When you're thinking of disruptions in the church, you're thinking more just quieting the disruption.
Q. Did Monsignor Kidder indicate to you that he was concerned with the possibility of arrests?
A. He may have. I don't recall.
Q. Okay.
A. I think we leave those things in the law enforcement's hands. They're going to do what they think they have to do. The church doesn't work in those terms. When law enforcement is present, that's their judgment.
Q. Well, did you have any understanding for the event that any church officials could intervene in any disturbance?
A. Ushers.
Q. Well, other than --

A. Church officials, you're saying?
Q. Well, church ushers.
A. Yeah. We would understand that they would -- that if something happened, they would do what they always do, what they normally do in a case like that.
Q. Was it your understanding that there were church ushers there, ushers who were regularly there for the church?
MR. PARRINELLO: "There," are you referring to the ceremony on January 6, 1991?

[84]

MR. CAREY: Right. For the event.
Q. Did you have any understanding that there would be church ushers at the event?
A. Yes, I'm sure I assumed that. They are at every service.
Q. Okay. Did you have any understanding that the church policies up until that date regarding the quelling of disturbances would still be in effect for that event?
A. Yes.
Q. Okay.
A. But as I say, this was an unusual situation where you had high government officials present, and so you had security there that would not normally be in the church, but would be there when there were officials.
Q. Were you aware of any instructions given to those security officials regarding the church's policies on quelling disturbances?
A. I don't know for sure, but I would think Monsignor Kidder talked to them about that, telling them what was normally done in church services.
Q. Okay. At that time did you have any understanding of what Monsignor Kidder's authority would be regarding the disturbances?
A. As a pastor of the cathedral, he would have the authority. I'm sure, though, when you bring in the element of law enforcement, that he acceded to their

[85]

authority and their jurisdiction. And I'm sure they consulted with him, and he consulted with them and tried to cooperate.

Q. Okay. Do you have any understanding at that time what the jurisdiction was of these security officials?

A. Do I have –

Q. Did you have any understanding?

A. Any understanding of?

Q. Of the jurisdiction of the security officials in the church, police officers?

A. My understanding at the time, I'm sure, was that they would have to conduct themselves as their profession requires.

Q. At the time of the event, did you have an understanding that if there was a disturbance, people would simply be removed, or did you have an understanding that they might be arrested?

A. If that entered into my mind, I was thinking it would be removal. I don't think arrest entered into my mind one way or the other.

Q. But you understood at the time that these security officers might have that authority to arrest; is that correct?

A. Yes. If I adverted to this concept, I would have realized that, yes.

Q. Did you express any concerns to Monsignor Kidder regarding the fact that police officers or

[86]

security officers would be determining what a disturbance was?

A. I don't think I expressed a concern.

Q. Okay.

A. We tried to handle it as peacefully as possible. We tried to anticipate that. That's why I say the policies would be what normally would be. There was an occasion there where some of the parishioners, or the people there in the church, were

in a position where the government officials were to be, and they preferred not to move. And it was the suggestion to the law enforcement people by Monsignor Kidder, and I agreed with it, that if these people wanted to stay there, see if you could relocate the government officials.
That's the only thing I remember rather clearly that morning.

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[87]

DEPOSITION REPORTERS' TRANSCRIPT - CLAREY

Do you recognize that individual?

[71]

A. I can't see his face. No.
Q. You don't recognize him? Okay.
(Discussion off the record.)
Q. BY MR. CAREY: Do you recognize him?
A. Tom Cooper.
Q. We're at 36:24. You recognize that as Tom Cooper?
A. Yes.
Q. Stop it. Did you recognize her?
A. No.
(Discussion off the record.)
Q. BY MR. CAREY: Channel 10, and it's 42 seconds, frame 20. Do you recognize the fellow in the background?
A. No.

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[72]